Pemunya Kapal MV Brihope & Ors v Emmanuel E Okwuosa & Ors

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NOS P-02-369-94, P-02-69-94 AND P-02-332-94
ZAKARIA YATIM, SHAIK DAUD AND MAHADEV SHANKAR JJCA
20 APRIL 1995

Civil Procedure *— Admiralty in rem — Writ — Only owners of ship and/or those legally liable for crew's claims should be described as defendants in writ — Only owners may enter appearance as of right in law — Other persons having interest in the ship must obtain leave to intervene and appear as interveners — Rules of the High Court 1980 Form 155*

Civil Procedure *— Affidavits — Affidavit in reply not filed within 14 days of plaintiff's service of writ but only a day before trial — No explanation in reply affidavit as to occurrence of delay — Affidavit rejected — Rules of the High Court 1980 O 32 r 13(2)*

Civil Procedure *— Summary judgment — Setting aside — Mortgagee of ship could have intervened before summary judgment but elected not to do so — Estopped from applying to set aside judgment after it was passed*

Civil Procedure *— Admiralty in rem — Statement of claim — No prayer for appraisement and sale of arrested ship — Not a material omission as all parties of various related actions knew that the ship was arrested and claims were filed — Res in the very same court where arrest action and action in which appraisement order was sought were heard — Not a mandatory requirement that res must be under arrest when application for appraisement order was made*

Civil Procedure *— Admiralty in rem — Priority of payments to several claimants to proceeds from sale of arrested ship — Whether ship must be arrested before order of sale — Whether lien must be crystallized before payment of sums accruing after judgment*

Civil Procedure *— Admiralty in rem — Master's claim for wages and disbursements — Whether s 122(c) of Merchant Shipping Ordinance 1952 applied only to seamen and not master of vessel — Merchant Shipping Ordinance 1952 ss 122(c) & 145(1)*

Three appeals were heard in this case. In the first appeal, the respondents were the master and crew of the MV Brihope ('the ship') which was owned by the appellant, Finego Enterprise Sdn Bhd ('Finego'). The ship was the subject of two mortgages to Hong Leong Sdn Bhd ('Hong Leong'). In the second and third appeals, the appellants were Hong Leong and the respondents were the same as those in the first appeal.

In 1994, the ship arrived in Penang with cargo belonging to L ('the cargo owners'). After arrival in Penang, L had problems with their cargo and they filed an action ('the first action') for the arrest of the ship. Subsequently, the respondents commenced an action ('the second action') to effect recovery of the wages and disbursements they claimed were due to them. The defendants were named in the

second action as 'The owner and all other persons having an interest in the ship MV Brihope'. Finego's solicitors entered appearance but the memorandum of appearance did not state that appearance was being entered for Finego Enterprise Sdn Bhd. A

The respondents/plaintiffs filed an application for summary judgment under O 14 of the Rules of the High Court 1980 ('the RHC') in the second action for the amount claimed, interest thereon and for an order that the ship be sold by public auction or private treaty to settle their claims. Finego did not file an affidavit in reply within 14 days of the respondents'/plaintiffs' service of the writ as mandated under O 32 r 13(2) of the RHC. Subsequently, just a day before the hearing of the application, a director of Finego, E, affirmed an affidavit in reply challenging the respondents' claim. There was no explanation as to why Finego waited so long to file their affidavit. The judge refused to allow Finego's affidavit to be used and made an order in terms of the application. Finego then filed their notice of appeal to the Federal Court (which was subsequently transferred to this court) ('the first appeal') and an application to the High Court to stay execution of the summary judgment pending their appeal. Hong Leong also filed a summons in chambers to set aside the summary judgment. Both Finego's and Hong Leong's applications were heard inter partes and dismissed by the High Court. Hong Leong then filed an appeal to the Court of Appeal ('the second appeal'). Notwithstanding the first arrest by the cargo owners, the ship was arrested again and the judge approved the conditions of sale. B C D E

The appraisement was subsequently completed and the warrant of arrest executed. The cargo owners released their arrest of the ship but filed a caveat against the release and payment out of the funds received pursuant to the sale of the ship ('the funds'). Finego then filed a caveat against the release of the funds while the respondents filed a motion for the determination of property and payment out of the proceeds of sale. Finego filed an application in the Federal Court for stay of distribution whilst Hong Leong filed a summons in chambers in the High Court for a stay of distribution. The High Court dismissed the application for stay and certified the priority distribution. Against this, Hong Leong filed an appeal in the Court of Appeal ('the third appeal'). F G

The subject matter of the first and second appeals and the objective of Finego and Hong Leong were identical, ie to reverse the order made by the High Court. The issues were whether E's affidavit was rightly rejected by the judge and whether the respondents were entitled to succeed in their application on the strength of their pleadings alone as it was alleged that the details of the respondents' claim contained many irregularities. H I

As for the second appeal, Hong Leong contended that the summary judgment given in favour of the respondents/plaintiffs' claim should be set aside and, in the alternative, that the order of appraisement

A and sale by the sheriff of the ship by public auction or private treaty to settle the respondents'/plaintiffs' claim be set aside as it was contrary to law. Hong Leong further contended, inter alia, that: (a) the interveners had a right to reopen the whole of the respondents'/plaintiffs' judgment against Finego and have the claim readjudicated; (b) in the statement of claim, there was no prayer for the appraisement and sale of the vessel; (c) the ship was under arrest in the first action and not in the second; and (d) the O 14 application being an application in chambers was not a proper vehicle for an application for appraisement and sale.

In the third appeal, Hong Leong appealed against the order made by the High Court on the priority of payments to several claimants out of the funds deposited in court from the sale of the ship. It was submitted that: (a) because the respondents/plaintiffs in the second action had not arrested the ship before the order of sale was obtained, they had no priority as their lien was only an inchoate lien up to that stage and had never crystallized; (b) s 122(c) of the Merchant Shipping Ordinance 1952 ('the Ordinance') only applied to seamen and not the master of the vessel and therefore the master's wages could not continue to run and be payable until the time of final settlement; and (c) there was no judgment for wages which accrued up to the time of signing off.

Held, dismissing Finego's appeal ('the first appeal'):

(1) The title to the second action called for adverse comment because the solicitors of the master and crew described 'the defendants' as 'The owners and other persons having an interest in the ship MV Brihope'. This was wrong because it did not follow the prescribed form as stated in Form 155 of the RHC. Only the owners of Brihope (and/or those legally liable for the plaintiffs' claims) should have been described as defendants. 'Persons interested in the ship' should form part of the citation to whom the writ was addressed. The ship's owners (and those legally liable for the plaintiffs' claims) would enter appearance as of right. Persons interested must obtain leave to intervene and, after obtaining leave, would appear as interveners.

In this case, Finego's solicitors did not seem to appreciate that they should not have entered appearance by following the way the title to the action was worded with the result that it could be left to speculation whether, in holding themselves out as the defendants' solicitors, they were acting not just for Finego but also in some indirect way to protect the interests of Hong Leong as well.

Also, the High Court's notes of evidence did not indicate that at any time the defendants' solicitors specifically stated that they were acting for Finego. It has to be implied from E's affidavit that the defendants' solicitor were acting for the shipowners alone (and therefore only for Finego), since Hong Leong was

separately represented. Since by law, only the owners could enter appearance as of right, the court would treat the appearance entered and the appellants as being Finego only (albeit with Hong Leong's consent) notwithstanding the way the appellant has been described in the action (see pp 469E–I and 470E–F).

(2) Order 32 r 13(2) of the RHC was specifically enacted to eradicate the rampant abuse of process by malevolent, indolent or unpaid practitioners who had devised a fail-safe method of causing unwarranted delays by filing affidavits at the last minute. In the present case, there was not one word in E's affidavit why the delay had occurred and, in the circumstances of this case, that delay was perverse. Therefore, E's affidavit was rightly rejected by the trial judge (see pp 470H and 471A, D–E).

(3) If Finego wished to mount a serious challenge, they could and ought to have done so as soon as they were served with the statement of claim. They could have applied for further and better particulars immediately. They could have filed their own accounts, but did nothing till the afternoon before the trial and the material Finego produced, even if it had been admitted, was most unconvincing (see p 472C).

(4) In the result, even though the quantum of the claim of the plaintiffs and particularly the master was so large as to raise one's eyebrows, the master had verified the totals claimed as required by O 14 r 2 in Form 18 (see p 472D).

Cases referred to

Aro Co Ltd, Re [1979] 1 Ch 613 (refd)
Bolbina, The [1994] 1 SLR 554 (refd)
Malayan Banking Bhd v Siong Electronic Industries Sdn Bhd & Ors [1994] 1 MLJ 704 (refd)
Soeraya Emas, The [1992] 1 SLR 33 (refd)

Held, dismissing Hong Leong's appeal ('the second appeal'):

(1) On the facts, Hong Leong were as good as privys because, under the default clause in the mortgages, their equity had crystallized and Finego were owners in name only as soon as the ship was arrested. They could have intervened before the application for summary judgment was heard on 7 June 1994 but elected not to do so. Therefore, they were estopped from applying to set the judgment aside after it was passed (see p 478C–D).

(2) The issue raised by Hong Leong about the wages and disbursements of the master and crew was a contractual issue as between Finego and the plaintiffs which was of no direct concern to Hong Leong (see p 478D–E).

(3) The Federal Court's decision in *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143 was binding upon the court. It categorically held that a final judgment could not be varied or set aside by the court which made it, unless it was a judgment by

default or made in the absence of a party at the trial or hearing. But if a judgment or order had been obtained by fraud or where further evidence which could not possibly have been adduced at the original hearing was forthcoming, a fresh action would lie to impeach the original judgment.

Also,the judgment obtained by the master and crew was in no sense an interlocutory judgment. It was a final judgment. Nor was it a default judgment and the defences which were taken by Hong Leong were the same defences which counsel for Brihope advanced, albeit without the help of E's affidavit. The plaintiffs had complied with O 14 r 2 of the RHC. As far as natural justice was concerned, the situation in this case was that a fair opportunity to being heard was afforded to Hong Leong who deliberately chose not to avail themselves of it when they appeared before the judge on 7 June 1994. To allow Hong Leong to reopen the same issues would have prejudiced the plaintiffs not least because of the tremendous delay it would have caused.

Further, if the intervener came in good time, he could defend the action in place of the owner, if the owner himself failed to appear. If he was attempting to set aside a final judgment to which he was not a party, he cannot take defences which the owner had not taken because he was no longer defending the claim in place of the shipowner. All he could do now was to assert his interest but the judgment in rem must stand as it did (see pp 479D–E, 482I, 483A–B, 484I and 485A); *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143 followed, *The Soeraya Emas* [1992] 1 SLR 33 not followed and *The Byzantion* (1922) 127 LT 756 distinguished.

(4) There were only four parties involved in this exercise — the shipowners, the crew, the cargo owners and the mortgagees — and at all material stages of the proceedings, both in the first and the second actions, all of them knew what the other was doing. The statement of claim in the second action referred to the arrest of the ship in the first action. The caveat by the crew in the first action was known to the shipowners. In the circumstances, the omission to request for an appraisement and sale in the statement of claim was not a material omission. Also, the learned trial judge had stated in the judgment why he ordered the appraisement and sale. The ship had been idle for a period of time, delay was prejudicial to the condition of the ship and its resale value, and the crew had gone without their wages for a very long period of time. Further, where the res was in the hands of the very same court, the requirement that the res must be under arrest in the action in which the order for appraisement and sale was sought was only a practice and not a mandatory requirement going to jurisdiction (see pp 486E, F–G and 488A–B, E).

(5) Before the appraisal and sale finally took place, the plaintiffs' solicitors regularized the position by arresting the vessel in the

action and Hong Leong participated in the exercise. Order 2 r 1 required the court to treat every non-compliance as an irregularity which the court could remedy as it thinks just. It was therefore not open to Hong Leong to contend that the order made was a nullity (see p 489C).

Cases referred to

Alleta, The [1994] LI LR 40 (refd)
Arantzaze Mendi [1939] AC 256 (refd)
Byzantion, The (1922) 127 LT 756 (distd)
Cap Bon, The [1976] 1 LI LR 543 (refd)
Dictator, The [1892] P 304 (refd)
Fairport, The (No 4) [1967] 1 Lloyds Rep 602 (refd)
Foong Tai v Buchheister [1908] AC 458 (refd)
Gemma, The [1899] P 285 (refd)
Glomar, The [1953] 2 Lloyds Rep 208 (refd)
Hock Hua Bank Bhd v Sahari bin Murid [1981] 1 MLJ 143 (folld)
Lord Strathcona, The [1925] P 143 (refd)
MUI Bank Bhd v Cheam Kim Yu (Beh Sai Ming, Intervener) [1992] 2 MLJ 642 (refd)
Nana Oforu Atta II Omanhene of Akyem Abukawa v Nana Abu Bonsra & Anor [1958] AC 95 (refd)
Soeraya Emas, The [1992] 1 SLR 33 (not folld)
Tolten, The [1946] P 135 (refd)
Tung Lieng (Penang) Trading v Liew Cheong Thye [1986] 2 MLJ 197 (refd)
Westport, The [1965] 1 LI LR 547 (refd)
Wexford, The (1887) 13 P 10 (refd)

Held, dismissing Hong Leong's appeal ('the third appeal'):

(1) In cases like this, it appeared important to distinguish between the holder of a maritime lien and a mere claimant whose elevation to the status of a secured creditor only took place by the invocation of the statutory jurisdiction and the arrest of the vessel. In the somewhat unusual circumstances of this case, the ship was already under arrest when the judgment was obtained. *Ex abundanti cautela* the respondents independently arrested the ship in the second action before the sale took place (see p 491E–F).

(2) The master's rights or recovery to his wages would continue to run and be payable until the time of final settlement. His rights were co-extensive with that of the seamen as the position of the master was amply covered by s 145(1) of the Ordinance (see p 491G–H).

(3) Where there was a maritime lien, all that was required before payment out of sums accruing due after the judgment was clear evidence that the additional sums claimed were in fact due. In the present case, the quantum of these wages were not in dispute. The liability for their continued payment till signing off was disputed by Hong Leong without any legal basis (see p 492B–C).

A Cases referred to

Arina, The (1887) 12 PD 118 (refd)
Aro Co Ltd [1979] 1 All ER 32 (refd)
Fairport, The [1966] 2 All ER 1026 (refd)

B [**Bahasa Malaysia summary**

Tiga rayuan telah didengar dalam kes ini. Dalam rayuan pertama, penentang-penentang merupakan nakhoda dan anak kapal MV Brihope ('kapal tersebut') yang dimiliki oleh perayu, Finego Enterprise Sdn Bhd ('Finego'). Kapal tersebut adalah perkara dua gadai-janji kepada Hong Leong Sdn Bhd ('Hong Leong'). Dalam rayuan kedua C dan ketiga, perayu-perayu adalah Hong Leong dan penentang-penentang adalah pihak yang sama seperti dalam rayuan pertama.

Dalam tahun 1994, kapal tersebut tiba di Pulau Pinang dengan kargo kepunyaan L ('pemunya kargo'). Selepas ketibaan di Pulau Pinang, L menghadapi masalah dengan kargo mereka lalu memfailkan D suatu tindakan ('tindakan pertama') bagi penahanan kapal tersebut. Berikutnya, penentang-penentang telah memulakan tindakan ('tindakan kedua') untuk mendapat kembali upah dan pembayaran yang mereka dakwa adalah terhutang kepada mereka. Defendan-defendan dinamakan dalam tindakan kedua sebagai 'Pemunya kapal dan orang-orang lain yang mempunyai kepentingan dalam kapal MV E Brihope'. Peguamcara Finego memasukkan kehadiran tetapi memorandum kehadiran tidak menyatakan bahawa kehadiran adalah dimasukkan untuk Finego Enterprise Sdn Bhd.

Penentang-penentang/plaintif-plaintif memfailkan suatu permohonan di bawah A 14 Kaedah-Kaedah Mahkamah Tinggi F 1980 ('KMT') untuk penghakiman terus dalam tindakan kedua bagi jumlah yang dituntut, faedah ke atasnya dan untuk suatu perintah agar kapal tersebut dijual melalui lelong awam atau triti persendirian untuk menyelesaikan tuntutan mereka. Finego tidak memfail afidavit jawapan dalam tempoh 14 hari daripada penyampaian writ penentang-G penentang/plaintif-plaintif seperti yang diwajibkan di bawah A 32 k 13(2) KMT. Ekoran itu, hanya sehari sebelum pembicaraan permohonan, seorang pengarah Finego, E, mengesahkan afidavit jawapan yang mencabar tuntutan penentang-penentang. Tiada penjelasan diberikan ke atas mengapa Finego menunggu begitu lama untuk memfail afidavit mereka. Hakim enggan membenarkan afidavit H Finego digunakan dan membuat perintah seperti dikehendaki oleh permohonan. Finego kemudian memfailkan notis rayuan mereka kepada Mahkamah Persekutuan (yang kemudiannya dipindah ke mahkamah ini) ('rayuan pertama') dan suatu permohonan kepada Mahkamah Tinggi untuk menggantung pelaksanaan penghakiman I terus sementara menunggu penyelesaian rayuan mereka. Hong Leong juga memfailkan suatu saman dalam kamar untuk mengetepikan penghakiman terus. Kedua-dua permohonan Finego dan Hong Leong didengar secara inter partes dan ditolak oleh Mahkamah Tinggi. Hong Leong kemudiannya memfailkan rayuan kepada Mahkamah Rayuan ('rayuan kedua'). Walaupun kapal tersebut pernah ditahan

oleh pemunya kargo, ia telah ditahan sekali lagi dan hakim meluluskan syarat-syarat jualan. A

Penilaian kemudiannya diselesaikan dan waran penahanan dilaksanakan. Pemunya kargo melepaskan penahanan kapal tersebut tetapi memfailkan kaveat terhadap pelepasan dan bayaran daripada wang yang diterima menurut jualan kapal tersebut ('wang tersebut'). B Finego memfailkan kaveat terhadap pelepasan wang tersebut manakala penentang-penentang memfailkan usul untuk penentuan harta dan bayaran daripada hasil jualan. Finego memfailkan permohonan di Mahkamah Persekutuan untuk penggantungan pembahagian sementara Hong Leong memfailkan suatu saman dalam kamar di Mahkamah Tinggi untuk penggantungan pembahagian. Mahkamah C Tinggi menolak permohonan untuk penggantungan dan mengesahkan pembahagian keutamaan. Hong Leong memfailkan rayuan dalam Mahkamah Rayuan terhadap keputusan ini ('rayuan ketiga').

Perkara subjek rayuan pertama dan kedua dan objektif Finego dan Hong Leong adalah sama, iaitu untuk mengakas perintah yang D dibuat oleh Mahkamah Tinggi. Isu-isu yang harus dipertimbangkan adalah sama ada afidavit E telah ditolak secara betul oleh hakim dan sama ada penentang-penentang berhak berjaya dalam permohonan mereka atas keteguhan pliding mereka sendiri kerana ia dikatakan bahawa butir-butir tuntutan penentang mengandungi banyak luar aturan. E

Berhubung dengan rayuan kedua pula, Hong Leong menghujahkan bahawa penghakiman terus yang diberikan memihak kepada tuntutan penentang-penentang/plaintif-plaintif harus diketepikan dan sebagai alternatif, bahawa perintah penilaian dan jualan oleh syerif kapal tersebut melalui lelong awam atau triti persendirian bagi F menyelesaikan tuntutan penentang-penentang/plaintif-plaintif diketepikan sebab ia bertentangan dengan undang-undang. Hong Leong selanjutnya berhujah, antara lain, bahawa: (a) pencelah mempunyai hak untuk membuka semula keseluruhan penghakiman penentang-penentang/plaintif-plaintif terhadap Finego dan meminta G supaya tuntutan dihakimi semula; (b) dalam pernyataan tuntutan, tiada permohonan untuk penilaian dan jualan kapal itu; (c) kapal tersebut berada di bawah penahanan dalam tindakan pertama dan bukan dalam yang kedua; dan (d) memandangkan permohonan A 14 adalah permohonan dalam kamar, ia bukannya cara yang wajar digunakan untuk permohonan penilaian dan jualan. H

Dalam rayuan ketiga, Hong Leong merayu terhadap perintah Mahkamah Tinggi atas keutamaan bayaran kepada pelbagai pihak menuntut daripada wang yang didepositkan di mahkamah akibat jualan kapal tersebut. Ia dihujahkan bahawa: (a) oleh kerana penentang-penentang/plaintif-plaintif dalam tindakan kedua tidak I menahan kapal tersebut sebelum perintah jualan diperolehi, mereka tidak mempunyai keutamaan sebab lien mereka hanyalah satu lien yang tidak sempurna hingga takat itu dan tidak pernah menjadi nyata; (b) s 122(c) Ordinan Perkapalan Saudagar 1952 ('Ordinan

tersebut') hanya terpakai kepada pelaut dan bukan nakhoda kapal dan maka upah nakhoda tidak boleh berterusan dan dikatakan harus dibayar sehingga masa penyelesaian muktamad; dan (c) tiada penghakiman untuk upah yang terakru sampai masa berhenti kerja.

Diputuskan, menolak rayuan Finego ('rayuan pertama'):

(1) Hakmilik kepada tindakan kedua memerlukan ulasan bertentangan sebab peguamcara nakhoda dan anak kapal menyifatkan 'defendan-defendan' sebagai 'Pemunya kapal dan orang-orang lain yang mempunyai kepentingan dalam kapal MV Brihope'. Ini adalah salah sebab ia tidak mengikut cara yang disyaratkan seperti yang dinyatakan dalam Borang 155 KMT. Hanya pemunya Brihope (dan/atau mereka yang bertanggungjawab di sisi undang-undang atas tuntutan plaintif-plaintif) harus digelar defendan-defendan. 'Orang yang berkepentingan dalam kapal tersebut' harus membentuk sebahagian daripada nama kepada siapa writ dialamatkan. Pemunya kapal tersebut (dan mereka yang bertanggungjawab di sisi undang-undang atas tuntutan plaintif-plaintif) memasukkan kehadiran secara hak. Orang yang berkepentingan mesti mendapatkan kebenaran untuk mencelah dan, selepas kebenaran diperolehi, hadir sebagai pencelah.

Dalam kes ini, peguamcara Finego nampaknya tidak sedar bahawa mereka tidak sepatutnya memasukkan kehadiran dengan mengikut cara bagaimana kata-kata dalam hakmilik kepada tindakan disusun dengan keputusan bahawa ianya mungkin terbuka kepada tekaan sama ada, dalam menggelar diri mereka peguamcara defendan-defendan, mereka bertindak bukan sahaja untuk Finego tetapi juga secara tidak langsung untuk melindungi kepentingan Hong Leong.

Tambahan lagi, nota keterangan Mahkamah Tinggi tidak menunjukkan bahawa pada bila-bila masa peguamcara defendan-defendan pernah menyatakan secara spesifik bahawa mereka bertindak untuk Finego. Haruslah disimpulkan daripada afidavit E bahawa peguamcara defendan-defendan bertindak untuk pemunya kapal tersebut sahaja (dan justeru itu hanya untuk Finego), oleh kerana Hong Leong diwakili secara berasingan. Oleh kerana di sisi undang-undang hanya pemilik sahaja yang berhak memasukkan kehadiran, mahkamah akan menganggap kehadiran dimasukkan dan perayu-perayu sebagai Finego sahaja (walaupun dengan kebenaran Hong Leong) tanpa mengira cara bagaimana perayu telah digambarkan dalam tindakan (lihat ms 469E–I dan 470E–F).

(2) Aturan 32 k 13(2) KMT digubalkan khasnya untuk membanteras penyalahgunaan proses mahkamah yang menular oleh pengamal yang berniat jahat, berat tulang atau yang tidak dibayar yang telah mencipta suatu cara pasti selamat untuk menyebabkan kelewatan yang tidak wajar dengan memfailkan afidavit pada

saat-saat terakhir. Dalam kes ini, tiada satu perkataan pun dalam afidavit E menjelaskan mengapa kelewatan telah berlaku dan, dalam keadaan kes ini, kelewatan itu adalah terlampau. Dengan itu, afidavit E telah ditolak dengan betul oleh hakim perbicaraan (lihat ms 470H dan 471A, D–E).

(3) Jika Finego ingin melancarkan cabaran yang serius, mereka boleh dan sepatutnya berbuat demikian sebaik sahaja mereka disampaikan dengan pernyataan tuntutan. Mereka sepatutnya memohon butir lanjut dan jelas dengan segera. Mereka sepatutnya memfailkan akaun sendiri, tetapi tidak membuat apa-apa sehingga petang sebelum perbicaraan dan material yang dikemukakan oleh Finego, jika pun ia diterima, sungguh tidak meyakinkan (lihat ms 472C).

(4) Kesudahannya, walaupun kuantum tuntutan plaintif dan khususnya nakhoda begitu besar hinggakan menyebabkan orang mengangkat kening, nakhoda telah menentusahkan jumlah yang dituntut sebagaimana yang dikehendaki oleh A 14 k 2 dalam Borang 18 (lihat ms 472D).

Diputuskan, menolak rayuan Hong Leong ('rayuan kedua'):

(1) Atas fakta-fakta, Hong Leong adalah sebaik pihak dalam tuntutan tersebut sebab, di bawah fasal ingkar dalam gadai-janji, ekuiti mereka telah menjadi nyata dan Finego adalah pemunya atas nama sahaja sebaik sahaja kapal tersebut ditahan. Mereka boleh campur tangan sebelum permohonan untuk penghakiman terus didengar pada 7 Jun 1994 tetapi telah memilih untuk tidak berbuat demikian. Oleh itu, mereka diestop daripada membuat permohonan untuk mengetepikan penghakiman selepas ianya dijatuhkan (lihat ms 478C–D).

(2) Isu yang ditimbulkan oleh Hong Leong mengenai upah dan pembayaran nakhoda dan anak kapal adalah isu kontraktual antara Finego dan plaintif-plaintif yang tiada kaitan langsung dengan Hong Leong (lihat ms 478D–E).

(3) Keputusan Mahkamah Persekutuan dalam *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143 adalah mengikat atas mahkamah. Ia memutuskan secara mutlak bahawa sesuatu penghakiman muktamad tidak boleh diubah atau diketepikan oleh mahkamah yang membuatnya, melainkan ia adalah penghakiman ingkar atau telah dibuat dalam ketiadaan sesebuah pihak di perbicaraan atau pembicaraan. Tetapi jika penghakiman atau perintah telah diperolehi melalui fraud atau di mana keterangan lanjut yang tidak mungkin dikemukakan di pembicaraan asal akan terbit, tindakan baru boleh dimulakan bagi mencabar penghakiman asal.

Juga, penghakiman yang diperolehi oleh nakhoda dan anak kapal bukanlah suatu penghakiman interlokutori. Ia adalah penghakiman muktamad. Ia juga bukan penghakiman ingkar

dan pembelaan yang diambil oleh Hong Leong adalah pembelaan sama yang dikemukakan oleh peguam Brihope, walaupun tanpa pertolongan afidavit E. Plaintif-plaintif telah mematuhi A 14 k 2 KMT. Sejauh mana keadilan asasi berkaitan, keadaan dalam kes ini adalah bahawa peluang adil untuk didengar telah diberikan kepada Hong Leong yang dengan sengaja memilih untuk tidak menggunakannya apabila mereka menghadapi hakim pada 7 Jun 1994. Jika Hong Leong dibenarkan membuka semula isu yang sama, ia akan menjejaskan plaintif-plaintif terutama sekali kelewatan terlampau yang akan diakibatkan.

Di samping itu, jika pencelah datang tepat masanya, dia boleh membela tindakan itu sebagai pengganti pemilik, jika pemilik sendiri gagal hadir. Jika dia cuba mengetepikan suatu penghakiman muktamad di mana dia bukan suatu pihak, dia tidak boleh mengambil pembelaan yang tidak diambil oleh pemunya sebab dia tidak lagi membela tuntutan sebagai pengganti pemunya kapal. Apa yang mampu dilaksanakannya sekarang hanyalah untuk menegaskan kepentingannya tetapi penghakiman dalam rem mesti dibiarkan (lihat ms 479D–E, 482I, 483A–B, 484I dan 485A); *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143 diikut, *The Soeraya Emas* [1992] 1 SLR 33 tidak diikut dan *The Byzantion* (1922) 127 LT 756 dibeza.

(4) Hanya empat pihak sahaja yang terlibat dalam pelaksanaan ini — pemunya kapal, anak kapal, pemunya kargo dan pemegang gadai-janji — dan pada semua tahap material prosiding, dalam kedua-dua tindakan pertama dan kedua, kesemuanya tahu apa yang dibuat oleh satu sama lain. Pernyataan tuntutan dalam tindakan kedua merujuk kepada penahanan kapal tersebut dalam tindakan pertama. Kaveat oleh anak kapal dalam tindakan pertama diketahui oleh pemunya kapal. Dalam keadaan begitu, peninggalan untuk meminta penilaian dan jualan dalam pernyataan tuntutan bukanlah peninggalan yang material. Juga, hakim perbicaraan yang arif telah menyatakan dalam penghakiman mengapa beliau memerintahkan penilaian dan jualan. Kapal tersebut telah terbiar beberapa lama, kelewatan menjejaskan keadaan kapal tersebut dan nilai jualan semula, dan sudah lama anak kapal tidak dibayar upah mereka. Selanjutnya, di mana res terletak di tangan mahkamah yang sama, keperluan bahawa res mestilah di bawah penahanan dalam tindakan di mana perintah penilaian dan jualan diminta hanyalah suatu amalan dan bukannya keperluan mandatori yang melibatkan bidang kuasa (lihat ms 486E, F–G dan 488A–B, E).

(5) Sebelum penilaian dan jualan akhirnya berlaku, peguamcara plaintif-plaintif telah menyatakan kedudukan dengan menahan kapal itu dalam tindakan dan Hong Leong telah menyertai pelaksanaan ini. Aturan 2 k 1 menghendaki mahkamah melayan setiap ketidakpatuhan sebagai luar aturan yang boleh dipulihkan oleh mahkamah seperti yang difikirkannya adil. Justeru itu, ia

tidak terbuka kepada Hong Leong untuk menghujah bahawa perintah itu adalah suatu pembatalan (lihat ms 489C). A

Diputuskan, menolak rayuan Hong Leong ('rayuan ketiga'):

(1) Dalam kes-kes seperti ini, adalah penting untuk membeza antara pemegang suatu lien samudera dan suatu pihak menuntut semata-mata yang mana pengangkatannya kepada taraf si piutang bercagar hanya berlaku akibat pemakaian bidang kuasa statutori dan penahanan kapal itu. Dalam keadaan yang agak luar biasa kes ini, kapal tersebut sudah pun berada di bawah penahanan apabila penghakiman diperolehi. *Ex abundanti cautela* penentang-penentang menahan kapal tersebut secara bebas dalam tindakan kedua sebelum jualan berlaku (lihat ms 491E–F). B C

(2) Hak nakhoda atau hak mendapat kembali upahnya akan berterusan dan harus dibayar sehingga masa penyelesaian muktamad. Haknya wujud bersama dengan hak pelaut sebab kedudukan nakhoda diliputi oleh s 145(1) Ordinan tersebut (lihat ms 491G–H). D

(3) Di mana terdapatnya lien samudera, apa yang hanya perlu sebelum pembayaran daripada jumlah yang terakru adalah bukti jelas bahawa jumlah tambahan yang dituntut harus dibayar pada hakikatnya. Dalam kes ini, kuantum upah-upah ini tidak dipertikaikan. Liabiliti untuk pembayaran berterusan mereka sehingga berhenti kerja dipertikaikan oleh Hong Leong tanpa sebarang dasar undang-undang (lihat ms 492B–C).] E

Notes F

For cases on admiralty, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 128–169.

For cases on affidavits, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 176–204.

For cases on summary judgment, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 3197–3520. G

Legislation referred to

Courts of Judicature Act 1964 s 24(b), art 8 of Schedule

Merchant Shipping Ordinance 1952 ss 98, 99, 113, 118, 119, 122(c), 145(1) H

Rules of the High Court 1980 Form 155, O 2 r 1, O 3 r 5, O 14, O 14 r 2, O 29 r 4, O 32 r 13(2), O 70 rr 10, 16, 20, 21

Supreme Court Act 1981 s 20(1) [UK]

Appeal from: Admiralty in Rem No 27–2–1994 (High Court, Ipoh) I

A In the first and second appeals:
Surinder Singh (*Lee Hishamuddin*) for the appellant.
Bernard Kok (*Ban Eng Anual & Foong*) for the respondents.

In the third appeal:
B *Gidean Tan* (*Lee Hishamuddin*) for the appellant.
Bernard Kok (*Ban Eng Anual & Foong*) for the respondents.
Felix Dorairaj (*Nahappan Dorairaj & Danker*) for the interveners.

First Appeal (Civil Appeal No P–02–369–94)

C **Mahadev Shankar JCA** (delivering the judgment of the court): The 26 respondents in this appeal are the master and crew of the MV Brihope ('the ship') which was owned by the appellant Finego Enterprise Sdn Bhd ('Finego'). The ship was the subject of two mortgages to Hong Leong Leasing Sdn Bhd ('Hong Leong'). She was registered in the Port of Penang on 21 October 1992. We heard this appeal together with two other D appeals (P 02–69–94 and P 02–332–94) and dismissed each of them with costs. These respondents are also the respondents in the other two appeals. The subject matter is the same. Our reasons for dismissing this appeal now follows.

In March 1994, the ship arrived in Penang with cargo belonging to E Messrs Lam Guan Chuan Sdn Bhd ('Lam Guan'). After arrival in Penang, Lam Guan had problems with their cargo. So they filed Penang High Court Admiralty in Rem Action No 27–1–94 ('the first action') and arrested the ship on 26 March 1994. Thereafter, the cargo was unloaded under the direction of the sheriff. On 30 March 1994, the ship's master and crew aforesaid (collectively referred to as 'the crew') filed a caveat F against the release of the ship and also against payment out of court of the proceeds of the sale thereof if so ordered.

On 13 April 1994, the crew commenced Penang High Court Admiralty in Rem Action No 27–2–94 ('the second action') to effect recovery of the wages and disbursements they claimed were due to them. The defendants G named were 'Pemunya Kapal dan orang-orang lain yang mempunyai kepentingan dalam Kapal MV Brihope' (or in English, 'the owner and all other persons having an interest in the ship MV Brihope).

Their statement of claim averred that their wages and disbursements as recorded in the crew's monthly wages account and due to them by the H shipowners came to an alleged total of RM468,300 as at 31 March 1994. The arrest of the ship in the first action was referred to. The judgment prayed for was:

(a) in respect of the amount claimed as wages due to them;

(b) a reference to the SAR to assess the amount due to each of them; and

I (c) interest, cost and such other relief as may be just.

Service of the writ was affected as provided by O 70 r 10 of the Rules of the High Court 1980 ('the RHC'). On 28 April 1994, Finego's solicitors entered appearance, but the form of the memorandum of appearance used did not state that appearance was being entered for Finego Enterprise Sdn Bhd, but stated: 'Masukan kehadiran untuk pemunya kapal dan orang-orang lain yang mempunyai kepentingan dalam kapal MV Brihope'. A B

On 6 May 1994, the crew filed an O 14 application for summary judgment in the second action for the amount claimed, interest thereon and for an order that the ship be sold by public auction or private treaty to settle the plaintiffs' claims. This application was supported by an affidavit affirmed by the master on 4 May 1994, for himself and his crew. This affidavit is in Form 18 of the RHC. It stated that the defendants were justly and truly indebted to them for RM468,300 as wages and allowances. By way of further particulars, the master annexed copies of the agreement and account of the crew made pursuant to s 99 of the Merchant Shipping Ordinance 1952 ('the Ordinance') and the crew's monthly wages account. He again referred to the arrest of the ship in the first action, and the failure of the defendants to provide them food and necessaries. And he averred that he believed there was no defence to the action. In short, the form of this affidavit complied with O 14 r 2(1) of the RHC. The application was fixed for hearing on 13 May 1994. It was adjourned at the instance of the defendants' solicitors (on grounds of short service) to 7 June 1994. On the same day, ie 13 May 1994, Lam Guan's solicitors sent a letter by AR registered to Hong Leong giving notice of the commencement of the first action; the arrest of the vessel; the proposed application for an order of sale and requested Hong Leong to state their interests. Hong Leong's reply to this letter is not before us. C D E

By PU (A) 192/93 on 1 August 1993, O 32 r 13 of the RHC was amended by the addition of a new sub-r (2) which made it mandatory for a party who was served with an affidavit in support of an application to file and serve his affidavit in reply within 14 days of the service of the affidavit in support of the application. Finego's solicitors did not comply with this rule. On 6 June 1994, a director of Finego by name of Eng Keng Ho ('Eng') affirmed an affidavit in reply challenging the claim of the plaintiffs. It was filed and served on the same day, but at the hearing the next day, plaintiffs' counsel objected to its admissibility. Azmel J refused to allow it to be used. F G

After reading the other cause papers and hearing the submissions of Mr Bernard Kok for the master and crew and Mr Surinder Singh Gill of counsel for defendants, Azmel J made an order in terms of the application. H

The shipowners applied on 8 June 1994 for further argument. On 17 June, Azmel J certified that he did not require further argument. Finego then filed their notice of appeal to the Supreme Court (now the Federal Court) on 24 June 1994. The appeal was registered as P02–359–1994 ('the first appeal'). I

In essence, Eng's affidavit was a challenge to the quantum of the plaintiffs' claim. He claimed that plaintiffs (6), (14) and (20) had already

left the ship for their home countries and the master could not speak for them. Eng also supplied his own accounts to show that the total crew claims for wages till March 1994 should amount only to RM61,019.05 (and not RM468,300 as claimed by the plaintiffs). While Finego was aware of this claim at least as early as 28 April 1994, there was no explanation as to why they waited till 6 June 1994 to file their affidavit.

By about 15 May, Hong Leong should have received the letter of the cargo owner's solicitors and were therefore aware of Admiralty in Rem No 1 of 1994. It follows that about the same day they ought to have been aware that Admiralty in Rem No 2 of 1994 had been filed. Hong Leong were content to let Finego take care of the litigation and instructed its own solicitor to hold a watching brief in the second action which he did by being present in court on 7 June. It is only after summary judgment was given on that day that Hong Leong decided to intervene. They applied ex parte on 17 June, got their order, and entered appearance on 22 June 1994.

After filing its appeal to the Supreme Court, Finego filed an application (encl 18) to the High Court on 1 July 1994 to stay execution of the summary judgment pending their appeal. Hong Leong filed a summons in chambers on 7 July 1994 to set aside the summary judgment (encl 22). Both applications were heard inter partes and dismissed by Azmel J on 12 August 1994. By this time the appellate courts had been reconstituted by the creation of the Court of Appeal. Finego's appeal to the Supreme Court remained alive as an appeal to the Federal Court. Hong Leong filed an appeal in the Court of Appeal on 19 August 1994 listed as P02–69–94 ('the second appeal'). (In effect there were two appeals to different courts against the same judgment!) Notwithstanding the first arrest by the cargo owners in Admiralty in Rem No 27–1–94, the ship was arrested again on 16 August 1994 in Admiralty in Rem No 27–2–94 by the crew. Only then did the sheriff apply for directions, and on 2 September 1994 the judge approved the condition of sale. Hong Leong participated in this exercise. The ship broker suggested by them was appointed to assist the sheriff and Hong Leong also volunteered to repatriate the crews, an offer the crew declined.

The appraisement was completed on 6 September, and the warrant of arrest in this action (encl 26) was executed on 8 September 1994. As the first tender was not acceptable to Hong Leong, they applied to the judge for a second tender and obtained an order to that effect on 22 September 1994 on the condition that they maintain the ship thereafter.

On 3 October 1994, the cargo owners released their arrest of the ship in Admiralty in Rem No 27–1–94, but filed a caveat in No 27–2–94 against the release and payment out of the funds.

The second tender was accepted by the end of October and the sheriff was in possession of the funds by 5 November 1994. The ship was released to the buyer on 24 November 1994. The contest for the distribution of the funds then began.

That same day, Finego filed a caveat against the release of the funds whilst the crew filed a motion (encl 69) that day for determination of priority and payment out of the proceeds of sale supported by the master's affidavit sworn on 1 December 1994 (encl 73). The crew also filed a notice for assessment of damages (encl 67).

On 2 December 1994, Finego filed an application in the Federal Court for stay of distribution. This was fixed for hearing on 3 January 1995. On 3 December 1994, Hong Leong also filed a summons in chambers for a stay of distribution (enc 75) in the High Court. Both encls 69 and 75 came on for disposal before Vincent Ng J on 12 December 1994, and he dismissed the application for stay (encl 75) and certified the priority distribution (encl 69). Against this, Hong Leong filed an appeal in the Court of Appeal on 19 December 1994 ('the third appeal'). It is listed as No P02–332–94.

In the Federal Court, Finego obtained an interim stay of distribution on 19 December 1994, pending hearing of their application proper which was heard on 3 January 1995. On that day, the Federal Court ordered by consent that the sum of RM61,019.05 admitted by Finego to be due to the crew be paid out of the funds held by the sheriff to the master and crew towards account of their claim for wages. The balance was to be retained pending the result of the appeal.

The subject matter of the first and second appeals and the objective of Finego and Hong Leong were identical, ie to reverse the order made by Azmel J on 7 June 1994. At our invitation, the parties agreed to apply for and obtained an order by consent for the first appeal to be transferred by the Federal Court where it was relisted as P02–369–1994.

When the three appeals came before us, the solicitors for Finego were permitted to withdraw. Finego was absent even though they had received prior notice from their solicitors to be present. The respondents' counsel requested us to dismiss the first appeal and with costs to be taxed and the deposit to be paid out towards account.

We wish to record here our appreciation to counsel for the painstaking way in which they covered the ground in these appeals. In view of the grey areas they exposed, it is desirable to restate some basic principles applicable to admiralty law and practice.

The admiralty jurisdiction of the High Court is provided by s 24(b) of the Courts of Judicature Act 1964 whereby the court has:

> the same jurisdiction and authority in relation to matters of admiralty as is had by the High Court of Justice in England under the United Kingdom Supreme Court Act 1981.

The United Kingdom Supreme Court Act 1981 can be found in any edition of the White Book after that date. Section 20(1) of the Act states, inter alia, that the admiralty jurisdiction of the High Court shall be as follows, that is to say:

A (a) jurisdiction to hear and determine any of the questions and claims mentioned in sub-s (2);

of which the relevant portions are:

(g) any claim for loss or damage to goods carried in a ship;

B (o) any claim by a master or member of a crew of a ship for wages (including any sum allotted out of wages or adjudged by a superintendent to be due by way of wages);

(p) any claim by a master, shipper, charterer or agent in respect of disbursements made on account of a ship.

C We are not called upon to say anything about the merits of the first action by the cargo owners. We need to emphasize however that when the ship was arrested, she went into the possession of the sheriff (admiralty marshal) of the Penang High Court (see *Re Aro Co Ltd* [1979] 1 Ch 613 at p 617 (followed in *The Bolbina* [1994]1 SLR 554 at p 559H by Selvam JC).

D The effect of the caveat of the crew in the first action was to prevent the release of the ship and payment out of the proceeds of its sale without the consent of the caveator or order of court. In the Supreme Court Practice 1991 ('the SCP 1991') para 75/14/1, there appears this passage:

> Use of the caveat procedure normally makes it unnecessary for a plaintiff in an action in rem against property which is under arrest in another action to
E issue a warrant for the arrest of that property.

The title to the second action calls for adverse comment because the solicitors of the master and crew described 'the defendants' as 'the owners *and* other persons having an interest in the ship MV Brihope'. This is wrong because it does not follow the prescribed form (see Form 155 of the
F RHC). The corresponding form in the Supreme Court Practice 1993 is Form 1 Vol 2 para 1301, and *Atkins Court Forms* (2nd Ed, 1990) Vol 3 at p 137. Only the owners of the Brihope (and/or those legally liable for the plaintiffs' claims) should have been described as defendants. 'Persons interested in the ship' should form part of the citation to whom the writ is
G addressed. The ship's owners (and those legally liable for the plaintiffs' claims) enter appearance as of right. Persons interested must obtain leave to intervene and after obtaining leave appear as interveners (I am indebted to Selvam J (as he now is) for this exposition which appears in *The Bolbina* at p 556). See also *The Soeraya Emas* [1992] 1 SLR 33 at p 36H where Karthigesu J deals with the same point.

H Finego's solicitors did not seem to appreciate that they should not have entered appearance by following the way the title to the action was worded with the result that it could be left to speculation whether in holding themselves out as the defendants' solicitors they were acting not just for Finego, but also in some indirect way to protect the interests of
I Hong Leong as well. What they had to state if they were only acting for Finego was that they were entering appearance for Finego Enterprise Sdn Bhd (see the SCP 1991 Vol 2 p 354).

The first mortgage deed executed by Finego in favour of Hong Leong was dated 1 June 1991 and the second on 2 October 1992. Article 5.01(o) required Finego duly and punctually to pay the wages of the master and crew and furnish evidence thereof to Hong Leong. Article 5.01(e) required Finego to notify Hong Leong promptly in the event of arrest and legal process. Article 6.01 enabled Hong Leong to exercise all its remedies in the event of default or if the security was in jeopardy. Article 6.04 conferred a general power of attorney in favour of Hong Leong and, by art 6.04(h), Hong Leong was specifically empowered to appear in any court and conduct pending legal proceedings in the name of Finego. It is therefore manifestly obvious that if they were minded to Hong Leong could have *defended* both the first and the second actions from the inception but chose not to do so.

Indeed, when the matter first came up for hearing on 13 May 1994, the defendants were represented by TML Lee who requested a postponement. On 7 June 1994, Mr Surinder Singh of Messrs Ong & Manecksha appeared for Finego and Mr Felix Doralraj of Nahappan, Dorairaj & Danker appeared for Hong Leong. The cargo owners' solicitors were also present by counsel Cik Christina Siew.

It is a curious situation we have here because the court's notes of evidence do not indicate that at any time the defendants' solicitors specifically stated that they were acting for Finego. Indeed Eng's affidavit of 6 June 1994 does not specifically state Finego's name. It has to be implied from this affidavit that the defendants' solicitors were acting for the shipowners alone (and therefore only for Finego) since Hong Leong was separately represented. Since by law only the owners could enter appearance as of right, we are treating the appearance entered and the appellants as being Finego only (albeit with Hong Leong's blessings) notwithstanding the way the appellant has been described here.

What happened on 7 June 1994 at the hearing calls for analysis along the following lines:

(i) was Eng's affidavit rightly rejected by the judge; and

(ii) were the master and crew entitled to succeed in their application on the strength of their pleadings alone.

When an O 14 application complies with the formal requirements of the rules, the onus is upon the defendant to show cause why he should be given leave to defend.

Order 32 r 13(2) of the RHC was specifically enacted to eradicate the rampant abuse of process by malevolent, indolent or unpaid practitioners who had devised a fall-safe method of causing unwarranted delays by filing affidavits at the last minute. The rule is mandatory. Of course, the court always has a discretionary power to extend time (see the Courts of Judicature Act 1964 item 8 of the Schedule and O 3 r 5 of the RHC 1980). But very powerful reasons must be advanced and the application for an extension should preferably be filed before time expired (in this case on 13 May or well before 7 June).

A In the present case, there was not one word in Eng's affidavit why the delay had occurred and, in the circumstances of this case, that delay was perverse. Even assuming that all Finego owed the master and crew was RM61,019.05, what excuse was there for keeping them incarcerated on the ship indefinitely until the court forced payment?

B In applying for Eng's affidavit to be rejected, Mr Bernard Kok, counsel for the plaintiffs cited *Malayan Banking Bhd v Siong Electronic Industries Sdn Bhd & Ors* [1994] 1 MLJ 704. It was held in that case that O 32 r 13 applies retrospectively, that affidavits filed after the 14-day period will not be received and that a formal application for extension or abridgement of time under O 3 r 5 of the RHC had to be filed before the C court would consider the matter. There was no such application here by the shipowners.

In response, the shipowners' counsel said he had difficulty in contacting his client in Singapore, Colombo and India and time was taken to obtain the vouchers. It is not for counsel to give evidence for his client D from the bar table. The statement of claim which contained details of the wages and disbursements was served on 13 April 1994, and we agree it was a lame excuse to say the the shipowners only started to collect their material for Eng's affidavit after service of the O 14 application. Eng's affidavit was rightly rejected by the trial judge.

E As a consequence, the shipowners' counsel was left to attack the plaintiffs' case by relying on its alleged inherent vices. He submitted that the details of the plaintiffs' claim contained many irregularities, but did not specify what those irregularities were. He also referred to s 119 of the the Ordinance and contended that the master of the ship did not have a blanket agency to put up the accounts for the wages of the crew.

F The evidence in support of the claim of the crew was contained in the master's affidavit which exhibited two documents, both of which were prepared pursuant to a statutory obligation. The first document, an 'agreement and account of crew', was made as provided by s 99 of the Ordinance. Section 98 of the Ordinance requires the master to enter into G such an agreement, and s 99 provides the form of the agreement. This was dated 30 October 1993 and filed at the Penang Port Office for a voyage commencing on 1 November 1993. It contained details of the quantum of wages agreed to be paid to each of the persons employed on board. The second document came from a register for the crew's monthly wages account. This is also a statutory requirement because by s 119 of the H Ordinance, this account had to be delivered to the port officer when the seamen left the ship and payment of wages (by s 118) had to be made in the presence of the port officer. The master had prepared these document himself and the crew's monthly wage account was made up to 31 March 1994.

I By way of example, the master's monthly wages according to the agreement was RM9,000 and the last balance claimed was RM213,102 (appeal record at p 82). These documents by themselves are not self-explanatory and not easy to understand. The master's monthly salary

at RM9,000 per month for the five months from March 1993 to 31 March 1994 should be RM45,000. How the claim became RM213,102 is not fully explained. The claim for San Win Aung was RM32,559.23. His monthly salary was RM2,277 and for five months is RM11,385. Apparently, he was due to be paid RM26,416.05 at the close of his articles on 31 October 1993 before he began new articles on 1 November 1993 for this voyage. There are various deductions which could explain the final figure.

No point would be served here in going through all the accounts in detail for each seaman. Suffice to say that if the shipowners wished to mount a serious challenge they could and ought to have done so as soon as they were served with the statement of claim. They could have applied for further and better particulars immediately. They could have filed their own accounts. They did nothing till the afternoon before the trial, and the material Finego produced, even if it had been admitted, was most unconvincing.

In the result, even though the quantum of the claim of the plaintiffs and particularly the master was so large as to raise one's eyebrows, the master had verified the totals claimed as required by O 14 r 2 in Form 18.

For the benefit of other solicitors who may hereafter find themselves in these waters, we think it is appropriate to observe that this application was not an application for a default judgment under O 70 r 20 where by r 20(7), notwithstanding the applicant's affidavit, the court must be satisfied that the applicant's claim is well founded before it can give judgment for the claim with or without reference to the registrar. In *The Soeraya Emas* [1992] 1 SLR 33 at p 44, Karthigesu J sought to extend these provisions to an O 14 application, but we must point our that the application before him was one which was *uncontested.* In that sense, the defendant there had allowed the judgment against him to go by default.

In the present case, Finego contested the application. It may be that Finego's solicitors were required by their client to make bricks with straw. The fact remains that Azmel J had no option but to give judgment as he did on the materials presented to him.

Before us, counsel for the master and crew said in passing that the figures claimed were so large because as each set of articles expired, the amounts previously due were carried forward and the old documents were no longer available. Whatever this may mean, the end result is that Finego chose to conduct its case in the court below and before us in a manner which made judgment against them inevitable. We therefore dismissed the first appeal.

Second Appeal (Civil Appeal No P–02–69–94)

Mahadev Shankar JCA (delivering the judgment of the court): The background to this appeal is fully set out in the first judgment. The undue length of this judgment may perhaps be mitigated by the novelty of the issues raised.

Hong Leong obtained leave to intervene on an ex parte application. The order was made on 17 June 1994 followed by Hong Leong's appearance on 22 June 1994.

Hong Leong's summons in chambers to set aside filed on 7 July 1994 prayed for two orders:

(a) that the whole of the order dated 7 June 1994 be set aside; and

(b) in the alternative, that the order of appraisement and sale by the sheriff of the ship by public auction or private treaty to settle the plaintiffs' claim be set aside.

This application was supported by the affidavit of Lim Teik Ee ('Lim'), the general manager of Hong Leong. In the affidavit, Lim stated that Hong Leong had obtained leave to intervene on 17 June, had entered appearance on 22 June, served the same on the solicitors for the plaintiffs and defendants and simultaneously requested for all the cause papers which were only sent to Hong Leong's solicitors on 30 June 1994. This state of affairs is very curious considering the presence of Hong Leong's counsel in court on 7 June 1994, and their prior awareness of the first and second actions on or about 15 May. Lim then refers to the judgment of 7 June 1994 for RM468,380 and avers it is:

> ... tidak selamat dan mengandungi isu-isu yang boleh dipertikaikan dan perlu diketepikan oleh kerana pihak plaintif-plaintif khususnya yang pertama, keempatbelas, ketujuhbelas dan keduapuluh tidak menentusahkan tuntutan mereka. Tambahan pula, eksh EEO 1 dan EEO 2 di dalam affidavit plaintif yang pertama adalah tidak konsisten dan mengandungi isu-isu yang boleh dipertikaikan.

The second ground averred by Lim was that the order for the appraisement and sale of the ship was contrary to law.

The master filed an affidavit opposing Hong Leong's application as an abuse of process for the following reasons:

(a) the court had already considered the plaintiffs' affidavit in entering judgment under O 14, and the interveners were attempting to reopen the issues on the quantum of the plaintiffs' claim which the court had already adjudicated upon;

(b) the interest of the interveners was confined to their position as mortgagees. They had no interest or equitable knowledge to question the plaintiffs' claim for wages;

(c) the shipowners had failed to pay the plaintiffs' wages after the arrest of the ship on 26 March 1994, and that up to date, ie 8 July 1994, the defendants had not provided food or necessaries to the plaintiffs;

(d) notwithstanding the judgment on 7 June 1994, the defendants had still not paid the plaintiffs' wages up to 31 March 1994 or accruing thereafter; and

(e) the plaintiffs will be prejudiced if the judgment is set aside.

It was further averred that the interveners would not be prejudiced on the sale of the ship since they could claim priority from the proceeds after the ship was sold.

The matter thus came up for disposal on 12 July 1994. Hong Leong was represented by Mr Felix Dorairaj. The shipowner's counsel Mr Nadkarni was there holding a watching brief as was the cargo owners' solicitor.

Hong Leong's counsel contended that the interveners had a right to reopen the whole of the plaintiffs' judgment against Finego and have the claim readjudicated.

This is a startling proposition because the judgment was a valid judgment and had been regularly obtained. Nevertheless, it was submitted that being a judgment in rem, it could be set aside because Hong Leong had an interest in the ship and was therefore entitled to attack the judgment.

It was further contended that the effect of this attack would not affect the personal liability of Finego to satisfy the judgment which would continue to operate against Finego alone as a judgment in personam.

Counsel said he was entitled to do this by reason of the judicial reasoning in *The Soeraya Emas* [1992] 1 SLR 33. This decision though not binding upon us, is deserving of the highest respect, bearing in mind the eminence of Karthigesu J as an admirality judge.

Before we proceed to analyse that decision, we feel obliged to make a response to Hong Leong's observations about the documents submitted by the master in support of the claim of the plaintiffs.

Counsel stated that the agreement and account of the crew made in pursuance of s 99 of the Merchant Shipping Ordinance 1952 ('the Ordinance') showed that the master and plaintiffs numbered (14) and (20) could have no claim because they had signed the release column. This suggestion was misconceived. The master's signature there was for signing off his wife who had come on board on 30 October 1993. Plaintiff (14) signed for the ship's carpenter Daw Hla Hla and plaintiff (20) signed for Mrs EA Yasawathie. Counsel also submitted that the plaintiffs' claims had not been verified. But the affidavit supporting the O 14 application was in the form required by the rules. Besides, each page of the crew's monthly account register was also signed by the master to state that he accepted it as correct.

Another line of argument was that the claim by the master for RM18,500 for an air ticket could not constitute wages and that two items of US$1,600 and US$4,000 referred to as a lending to Capt Roy Eng could not constitute wages as defined by the law. Paragraph 321 of the text book *Maritime Liens* (*British Shipping Laws* Vol 14 (1980)) by DR Thomas at p 184 shows how liberally the term 'wages' is construed as a matter of admiralty policy. There was nothing in this point because Capt Roy Eng was the shipowner and in the context of this case the two sums could equally be construed as advances made by Capt Roy Eng to the master which he had to account for.

Next, Hong Leong's counsel contended that the prayer in the statement of claim for the senior assistant registrar to assess the amount due to each plaintiff was ambiguous. As to this, it has to be said that the plaintiffs were claiming not just for the total wages and disbursements due till 31 March 1994, but also additional sums due to them until the day they were paid off. We see no ambiguity here.

Next, he contended that in the statement of claim there was no prayer for the appraisement and sale of the vessel. He cited firstly *Admiralty Practice* (*British Shipping Laws* Vol 1 (1975)) para 382 at p 167 ('the first authority') and *Admiralty Jurisdiction and Practice* (1993) by Nigel Meeson at p 144 ('the second authority'). In the first authority is a passage that:

> the res must be under arrest *in the action* in which the order of appraisement and sale is asked for and if necessary may be arrested a second time for this purpose. (Emphasis added.)

The same statement appears in the second authority at p 145 where the prescribed procedure for such an application is not a summons in chambers, but a notice of motion (to be heard in court) supported by affidavit. The plaintiffs' application under O 14 was made in chambers. The master's affidavit in support did not state the grounds why the ship should be sold. The ship was under arrest in the first action but not yet under the second. We shall deal with these objections later.

Counsel for the plaintiffs submitted that Hong Leong had not been in any way prejudiced by the sale, that in *The Soeraya Emas* [1992] 1 SLR 33, the judge had erred in law by failing to draw the proper distinction between a judgment in rem and one in personam and more importantly that the master and crew had a maritime lien over the ship which entitled them to apply for an order for its sale to pay their accrued wages in any event. He referred to *MUI Bank Bhd v Cheam Kim Yu (Beh Sai Ming, Intervener)* [1992] 2 MLJ 642 where the Supreme Court held that once a judge had made an order of sale of charged land, he was functus officio and it was too late for an intervener to apply to set it aside. He also referred to *Tung Lieng (Penang) Trading v Liew Cheong Thye* [1986] 2 MLJ 197 to the effect that once a final order was made, the judge was functus officio.

On 12 August 1994, the trial judge dismissed the interveners' application. In his grounds of judgment dated 1 October 1994, he pointed out that Hong Leong had not tendered any new documents and had relied on the same documents he had already considered on 7 June 1994. He held that the decision on that day was not a default decision but a final judgment delivered after hearing both sides. Therefore, he said he was functus officio and the more so as there was an appeal pending to the Supreme Court by Finego. He referred to *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143 and the cases therein cited by Chang Min Tat FCJ. This decision stipulates that a judgment regularly obtained cannot be varied or set aside by the court which made it except under the slip rule unless it is a judgment in default, or made in the absence of a party. If the

judgment was obtained by fraud or further material evidence not available at the time is forthcoming to impeach it, then a fresh action to do so may be commenced. None of these factors applied here. A

In the event that he was functus officio, Azmel J held that the application had no merits because Hong Leong had not produced any new material to contradict the plaintiffs' accounts. B

He then dealt with the plaintiffs' maritime lien, referring to 1 *Halsbury Laws* (4th Ed) at p 233 para 338, and s 145 of the Ordinance. On wages, he referred to ss 135 and 136 of the Ordinance. For his power to order sale, he referred to 1 *Halsbury's Laws* (4th Ed) at p 287 para 453.

As for his reasons for ordering the appraisement and sale, he said this: C

> From the above excerpts, I am satisfied that the plaintiffs as master and crew of the defendants' ship have maritime lien over the said ship in respect of their claims for wages irrespective whether freights had been earned or not. It is an undisputed fact that the ship had been arrested at the time of the commencement of this action. And in order to realize their claims against the defendants, it is only proper under the circumstances to order the sale of the ship which I did. The sale has to be executed as early as possible because the ship has been idle for a period of time. Further delay would deteriorate the conditions of the ship and may further reduce the sale price. In addition, to that the plaintiffs must be paid their wages as quickly as possible. They had been without money over a very long period of time. The defendants had done nothing to make any payments to them. Hence, the earliest possible sale of the ship would enable the 26 plaintiffs to be paid their salaries. As a matter of fact, during this hearing, I have verbally inquired from the counsels for the defendants and the interveners whether their clients were prepared to pay the wages of the plaintiffs and, if so, the sale of the ship could be postponed or set aside. However, neither of them was prepared to do so. In the circumstances, I have no choice but to order the sale of the ship to be executed as early as possible. In the circumstance, the application for a stay of the sale of the ship pending appeal by the defendants was rejected. D E F

The object of permitting intervention is 'to prevent multiplicity of actions and to enable the court to determine disputes between all parties' action and to prevent the same or substantially the same questions or issues being tried twice with possibly different results'. '... A person may be added as a party who is directly affected either legally or financially by any order which may be made in action.' 'To entitle a person not a party to an action to intervene and to be joined as a party, the rule (O 15 r 6) requires that the would be intervener should have some interest which is directly related or connected with the subject matter of the action ... .' (The words in quotes are from the Supreme Court Practice 1993 Vol 1 para 15/6/7). G H

Intervention in admiralty proceedings in rem is covered by O 70 r 16 of the Rules of High Court 1980 ('the RHC') (which is similar to but not in pari materia with the English rule O 75 r 17). These differences are not material to our present purposes. Under our rules, the intervener applies I

A ex parte for leave to appear and having obtained it, he would be treated as if he were a defendant named in the writ.

The rules do not state at which point in time such intervention should take place, but what should be noted is that intervention is not a matter of right but may be had only with the leave of the court. Judicial B discretion is involved. The issue which then arises is whether a person who seeks to intervene after final judgment has been obtained against the defendant should be permitted to do so at all and if so in what circumstances.

We now wish to refer to some passages from the judgment of Lord Denning in *Nana Oforu Atta II Omanhene of Akyem abukawa & Anor v* C *Nana Abu Bonsra & Anor* [1958] AC 95 at p 101:

> The general rule of law undoubtedly is that no person is to be adversely affected by a judgment in an action to which he was not a party, because of the injustice of deciding an issue against him in his absence. But this general rule admits of two exceptions: one is that a person who is in privity with parties, a 'privy' as he is called, is bound equally with the parties, in which D case he is estopped by res judicata: the other is that a person may have so acted as to preclude himself from challenging the judgment, in which case he is estopped by his conduct. Their Lordships propose in this case to consider first estoppel by conduct.

at p 102:

E > Those instances do not however cover this case, which is not one of active participation in the previous proceedings or actual benefits from them, but of standing by and watching them fought out or at most giving evidence in support of one side or the other. In order to determine this question, the West African Court of Appeal quoted from a principle stated by Lord Penzance in *Wytcherley v Andrews* (1871) LR 2 P & M 327 at p 328. The full F passage is in these words:
>
> > 'There is a practice in this court, by which any person having an interest may make himself a party to the suit by intervening; and it was because of the existence of that practice that the judges of the prerogative court held that if a person, knowing what was passing, was content to stand by and see his battle fought by somebody else in the same interest, he G should be bound by the result, and not be allowed to re-open the case. That principle is founded on justice and common sense, and if acted upon in courts of equity, where if the persons interested are too numerous to be all made parties to the suit, one or two of the class are allowed to represent them; and if it appears to the court that everything has been done bona fide in the interests of the parties seeking to disturb 'the H arrangement, it will not allow the matter to be re-opened.'

at p 103:

> In the present case, the judges have applied the principle and given reasons which show that it is salutary. In the Supreme Court, Jackson J said:
>
> I > 'The principle is clear and well-established and to hold otherwise would only tend to encourage perjury and to seek to bolster up a case by later adducing evidence which, had it been in existence, would or should have been adduced at the first trial.'

In the Court of Appeal Manyo-Plange J said:

> '... what should the Omanhene of Akim Abuakwa have done in the circumstances? In my view, he should have applied to be joined as co-plaintiff. He took no such course. Being cognizant of the proceedings, he was content to stand by and see his battle fought by somebody else in the same interest: the interest is the same, because the matter to be determined in the present action was the same as was determined in the former action, namely, Muronam's title to the land in dispute, without which Akim Abuakwa cannot establish an interest in the land. Having stood by and seen the battle fought to a finish to the disadvantage of Muronam, he goes to sleep for nearly five years, then suddenly wakes up and tries to re-open the question of Muronam's title to the land in dispute which had been determined in the action.'

On our facts, Hong Leong were as good as privys because under the default clause in the mortgages, their equity had crystallized and Finego were owners in name only as soon as the ship was arrested. They could have intervened before 7 June 1994, but elected not to do so. Therefore, they were estopped from applying to set aside the judgment after it was passed.

Had they done so in time, could they have ventilated the issues which they raised about the wages and disbursements of the master and crew? This was a contractual issue as between Finego and the plaintiffs which was of no direct concern to Hong Leong.

In *The Lord Strathcona* [1925] P 143, the plaintiffs were the mortgagees. Their action in rem was against the shipowners who had defaulted in the mortgage payment. Their claim was for judgment: (i) for the validity of their mortgages; (ii) against the ship and the freight due to them; and (iii) for an order of sale. No appearance was entered and judgment in default was given condemning the ship and ordering her sale. The interveners were the charterers. The judgment was given on 26 January. The interveners appeared on 11 February. They raised two questions: (i) they questioned the validity of the mortgages; and (ii) they alleged that since the plaintiffs were aware of the existence of the charterparty before the mortgages were created, the plaintiffs were bound by them.

In his judgment as to the first question, Hill J said at p 150:

> As for the first contention, I asked and received no satisfactory answer to the question: What right have the interveners to raise the contention at all in this action? The interveners have a contractual right and nothing more. I cannot see what locus standi they have to dispute the validity of the plaintiffs' mortgages. But I need not further consider this, for the interveners took the benefit of the performance of the charterparty by the Lord Strathcona Steamship Co (No 2) as owners for several reasons and cannot now be heard to say that the Strathcona Co never were owners. As to the second contention, while it is clear that the interveners cannot, as against the plaintiffs, dispute the judgment which pronounced for the validity of the mortgages and condemned the ship, they are entitled to be heard when they allege that, by reason of their contractual right, the plaintiffs ought to be restrained from exercising their own rights as mortgagees in such a way as to interfere with the contractual right of the interveners; and the question is

whether the interveners are entitled at all, or on the facts of this case, to limit the plaintiffs' right to procure a sale by the court. *They cannot question the judgment in rem.* Can they interfere with the plaintiffs' right to obtain execution of that judgment by appraisement and sale? A similar question would be involved if, instead of proceeding in rem, the plaintiffs had taken possession and proposed to sell or to use the ship without regard to the charterparty. (Emphasis added.)

As we understand this decision, the issue of the validity of mortgages was not one the charterers could raise afresh because it was *res inter alios acta.* Thus, even though it was a default judgment, the interveners could not set it aside. Since it was a judgment in rem, the charterers could not question it either. The only issue then left was whether the sale of the ship should be proceeded with because that would have interfered with the operations of the charterers.

The next point to be emphasized once more is that *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143 at p 144E, is a decision of the Federal Court. It is binding on us. It categorically states that a final judgment cannot be varied or set aside by the court which made it, unless it is a judgment by default or made in the absence of a party at the trial or hearing. But if a judgment or order has been obtained by fraud or where further evidence which could not possibly have been adduced at the original hearing is forthcoming, a fresh action will lie to impeach the original judgment.

We will now proceed to consider propositions Hong Leong's counsel sought to extract from *The Soeraya Emas* [1992] 1 SLR 33. At the risk of some distortion, the facts there can be summarized thus. In 1985, Aseamlease Bhd ('Aseam') sold the ship to Perkapalan Emas ('the shipowners') who made a downpayment of about 20%, and entered into a mortgage in favour of Aseam to repay the balance due in monthly instalments. On 16 August 1988, Singapore Slipway filed Writ in Rem No 245 of 1988 ('the first action'). Their claim was for work done and materials supplied for repairs to the ship. On 23 January 1989, Singapore Slipway arrested the ship in the first action. Several other claimants came forward to assert their claims against the ship in the usual way, ie by first lodging a caveat against release, and then applying for leave to intervene and filling an appearance.

Four of these claimants were:

(i) Aseam as mortgagees who entered appearance on 9 February 1989;

(ii) Inter Maritime whose claim was for various expenses disbursed on behalf of the shipowners including crew, waters, bunkers and repairs. They entered appearance on 27 February 1989;

(iii) Hang Sing whose claim was for goods and services rendered to the ship prior to its arrest by Singapore Slipway. Hang Sing entered appearance on 3 March 1989; and

(iv) the shipowners who entered appearance on 10 February 1989.

The shipowners then stood by and did not prevent Singapore Slipway from:

(i) getting leave to enter summary judgement on 20 March 1989 for $268,130 plus interest and costs, and

(ii) entering judgment on 8 April 1989.

On 4 March 1989, Singapore Slipway obtained a court order *by consent* of the shipowners to make payment to the crew of the ship and repatriate them, these expenses to form part of the sheriff's expenses, that the ship be appraised and sold, and that the proceeds of sale be deposited in court (the other terms of this order need not delay us here). All the interveners who appeared also consented to the order *except Inter Maritime* whose consent was not endorsed on the draft order.

The ship was sold for $1.04m on 8 April 1989. On 26 May 1989, Singapore Slipway obtained a court order for the payment out of the sheriff's expenses as being of first priority ranking and for the relative priorities of all other claims to be reserved.

On 14 February 1989, Aseam had filed Admiralty in Rem No 51 of 1989 against the shipowners ('the second action') and served the ship on 20 February 1989. The ship was then under arrest in the first action and continued to be in the custody of the sheriff till her sale on 8 April 1989.

In this second action:

(i) Singapore Slipway obtained leave to intervene and appeared on 11 March 1989.

(ii) The shipowners appeared on 21 March 1989.

On 25 April 1989, Aseam applied for summary judgment under O 14 in the terms of their amended statement of claim. When their application was heard on 21 July 1989, the shipowners *consented* to Aseam's money claim without raising any defence by way of affidavit. The order of court dated 26 July 1989 provided that the mortgage by the shipowners and Aseam dated 11 December 1985 be declared valid and *by consent* gave liberty to enter final judgment for the money claimed in their last amended statement of claim. However, at the time of Inter Maritime's subsequent attack on this order, final judgment had *not* been entered and in the circumstances which followed, it never was.

Karthigesu J said there was duplicity on the part of the shipowners in not contesting Aseam's claim (see judgment at p 39C) because their act in entering appearance and then not contesting the mortgage was inexplicable. He pointed out that Aseam had obtained an in rem judgment and being a secured creditor ranked high in the order of priority of claims.

Having got this judgment, Aseam applied on 10 August 1989 in the first action by motion for a determination that their claim ranked above all other claims for payment out. Inter Maritime, having already intervened in the first action as aforesaid, now responded by applying for and obtaining leave to intervene in the second action and entered appearance on 31 August 1989.

On 6 September 1989, they applied:

(i) firstly that the whole of the consent order made on 21 July 1989 and any judgment entered pursuant thereto to be set aside; and

(ii) additionally or alternatively for a declaration that the consent order of 21 July 1989 shall not be binding on Inter Maritime.

On 3 April 1990, the learned assistant registrar upheld a preliminary objection by Aseam's counsel and held that the court could not set aside a consent judgment and further held that Inter Maritime had no locus standi. He dismissed the second prayer on 11 April 1991.

The matter then came up on appeal before Karthigesu J. At pp 40–42 of his judgment, he followed *The Gemma* [1899] P 285, *The August 8* [1983] 2 AC 450 and *The Dictator* [1892] P 304, and held that once the shipowners entered appearance to Aseam's writ, the action continued not only in rem against the ship but also in personam.

Then comes this passage in the judgment (at p 42) upon which Hong Leong's counsel places such heavy emphasis for the proposition he advanced. It is reproduced here in full:

> In my view, the learned assistant registrar failed to appreciate this important principle and refinement given to it by Lord Brandon in *The August 8* [1983] 2 AC 450. Had he appreciated it, he would not have fallen into the error of applying the principles applicable solely to setting aside of consent judgments in non-admiralty civil actions and confusing the standing of Inter Maritime as intervener in these proceedings. In so far as Inter Maritime were concerned, these proceedings were and still are an admiralty action in rem, but in so far as the defendants are concerned, by reason of their appearance and albeit by their consent, a judgment has been entered against them for which they, Perkapalan Emas, are also personally liable.
>
> This being so, the order of court dated 21 July 1989 giving the plaintiffs leave to enter final judgment against the defendants, binds only the plaintiff and the defendants, Perkapalan Emas. The order, being made with the consent of the defendant, cannot be set aside by the defendants. In such a situation, the cases relied on by the plaintiffs such as *Ainsworth v Wilding* [1896J 1 Ch 673 and *Emeris v Woodward* [1898] Ch 185 would apply. The court would not have the jurisdiction to set aside the consent judgment. The same may be true of Singapore Slipway, an intervener, who entered an appearance in these proceedings, had they applied to set aside the order of court dated 21 July 1989 since they appeared at the O 14 hearing, raised no defences and consented. But Inter Maritime had not then entered upon these proceedings and could not therefore have consented. I am not persuaded by plaintiffs' counsel's argument that had Inter Maritime been vigilant to protect their interest against The Soeraya Emas they would have intervened in these proceedings before 21 July 1989 and by not doing so had deliberately allowed the order to have been made. Accordingly, it was too late for them now to apply as an interested party to set aside the order of court of 21 July 1989.

We have not found this part of the judgment easy to understand, especially how it comes to be suggested that a shipowner *can continue* to be held liable under a judgment in an action in rem to which he has entered appearance, when that very judgment has been set aside by a successful

intervener. The only precedents we have been able to find of a final judgment in personam and in rem are Forms 313 and 314 in *British Shipping Laws* (1964). We can find nothing here to suggest that a final judgment in rem is a divisible commodity, so that if it is set aside at the instance of an intervener, it can still continue to have an independent existence against the shipowner.

There are of course authorities to say that the shipowner who has entered appearance will incur a liability in personam which overlaps the judgment in rem so that if the proceeds of sale of the ship are insufficient to satisfy the plaintiffs' claim, the plaintiffs can still proceed against the owner personally (see *The Gemma* [1899] P 285 at p 292 and *The Dictator* [1892] P 304 at p 320). But in those cases, there was only *one* judgment in the contemplation of the court, and it was an in rem judgment. The fact that it encapsulated a liability in personam did not change the fact that there was *one* judgment.

The reasons of the learned judge in *The Soeraya Emas* [1992] 1 SLR 33 for setting aside the whole of the order made on 21 July 1989 (see judgment at p 40G) may be tabulated thus:

(i) Inter Maritime had sufficient interest to intervene in the action;

(ii) they were permitted to set up such defences as the owner could have set up if the shipowners had defended the action;

(iii) they had raised a prima facie case which cast a doubt on the validity of the mortgages;

(iv) they had locus standi because if the mortgages were invalid they had a greater certainty of having their claim paid out;

(v) the shipowners could be accused of duplicity in not taking the defences going to the validity of the mortgages and therefore the merits of Aseam's case;

(vi) it was essential that the merits of the plaintiffs' case be look into in an application for summary judgment in an in rem action, and a consent judgment is equated to a default judgment for this purpose;

(vii) additionally, natural justice demands that if there is any defence to the plaintiffs' claim, the interveners ought to be allowed to raise it provided the plaintiffs are not prejudiced thereby; and

(viii) lastly, O 14 proceedings if not watched carefully in admiralty in rem actions could lead to abuse.

The remarks of Karthigesu J which follow about unscrupulous shipowners colluding with master and crew to inflate wages were of course obiter dicta. In our case, there is no suggestion whatsoever of any collusion whatsoever between the parties. The judgment obtained by the master and crew was in no sense an interlocutory judgment. It was a final judgment. Nor was it a default judgment, and the defences which were taken by Hong Leong were the same defences which counsel for the Brihope advanced, albeit without the help of Eng's affidavit. Nor do we have any amendments to our rules in parity with the Singapore Rules of Supreme

A Court O 14 r 2(8). Our plaintiffs complied with the RHC O 14 r 2. As for natural justice, our situation is that a fair opportunity of being heard was afforded to Hong Leong who deliberately chose not to avail themselves of it when they appeared before the judge on 7 June 1994. To allow Hong Leong to reopen the same issues would have prejudiced the plaintiffs not least because of the tremendous delay it would have caused.

B

An added problem in our case is that, if appearance had been correctly entered, it would have read 'Enter on appearance for Finego'. The judgment would then have been against them personally. The proper form the judgment should have taken has not been canvassed before us. The error earlier referred to was as a consequence carried forward into the C summary judgment given here which was 'terhadap defendan-defendan' (ie the owners and other persons having an interest in the ship MV Brihope). Hong Leong were there and did not object to the order being made in this form. These differences are sufficient to negate any comfort Hong Leong can hope to derive from *The Soeraya Emas*.

D We would now go further to say that we cannot accept *The Soeraya Emas* is good authority for the proposition that interveners in an admiralty in rem action can come in at any time after a final judgment has been pronounced and have the whole matter reopened to take defences the shipowners ought to have taken.

E There is no question of any *right* of intervention here. Order 70 r 16 is clear. 'A person who has an interest in that property ... *may*, with the leave of the court, intervene in the action.'

Had Hong Leong come in before the judgment was pronounced on 7 June 1994, we are not prepared to say that *The Lord Strathcona* [1925] F P 143 in any way opens the door for Hong Leong to question the quantum of the wages. That defence was only open to Finego. The charterer in *The Lord Strathcona* was not permitted to attack the validity of the mortgages because they had no locus standi, and they were not permitted to attack the judgment just because it was an in rem judgment.

G The last sentence from the passage we have quoted from p 42G shows that Karthigesu J was not persuaded by arguments that Inter Maritime should have been vigilant, but how can this be extended to cover proposed interveners who want to come in after final judgment has been given? Page 43E of his judgment reads:

H

> A person who has been given leave to intervene in an admiralty action in rem does not prosecute his claim in that action. He protects his interest in the property by defending the action in rem. In doing so, he will be permitted to set up such defences which the owners of the ship could have set up had they defended the action. See *The Byzantion* [1922] 16 Asp MLC 19; 127 LT 756.

I In the report of *The Byzantion* [1922] 127 LT 756, the first two paragraphs read as follows:

> The admiralty court has jurisdiction under s 3 of the Admiralty Court Act 1840 to take cognizance of mortgage claims relating to a ship if the ship or

proceeds are under arrest of the court at the time when the proceedings are instituted, notwithstanding that the mortgage is not a legal mortgage. A

A party who intervenes in, and defends an action *in rem* cannot set up defences which the owners of the ship could not have set up had they appeared and defended.

and in the judgment at p 759 is this passage: B

The result is that, whatever the Greek law, and whether the mortgagees have in fact a mortgage upon a ship or not, they, by agreement, are to have the same rights as against Mr Mango as if they had a registered mortgage on an English ship. Mr Mango, by contract, agrees to submit to the jurisdiction in rem or in personam given to the court by s 11 of the Act of 1861 as if the ship and mortgage were registered in England. The effect is two fold: (1) as to jurisdiction, there is jurisdiction by contract; (2) as to rights, as between the Graham Company and Mr Mango, the Graham Company are to be treated as if they were registered mortgagees of a British ship, and as if entitled to sue in rem. The interveners contend that they cannot be prejudiced by this agreement between the mortgagees and mortgagor, and that as against them, the agreement must be disregarded. In my view, this contention confuses the rights of the intervener. Intervention may be for either or both of two purposes: (1) to defend the action either as to liability or as to quantum or both, and (2) to establish a prior claim to the res without defending the action. But where the intervener defends, he defends an action not against himself but against the res and, as there can be no liability of the res unless there is a personal liability of the owner, he defends an action against the owner. The questions on such a defence are: Is the owner liable to the plaintiff, and has the plaintiff a right in rem against the ship? It follows that the intervener cannot set up defences unless they are defences which the owner could set up. If the suit is one which the plaintiff could, if the owner appeared, maintain in rem against the ship, because the owner was liable in a suit in rem, the plaintiff can maintain it in rem against the intervener. The position of the intervener is, qua defence, the same as that of an owner who appears under protest, and the issue to be tried is the same as on a petition in protest. If by agreement, the Graham Company have a good cause of action in rem and, if by the agreement the court is given jurisdiction as between the Graham Company and Mr Mango, the interveners in defending the action cannot stand in any better position than Mr Mango. C D E F G

In *The Byzantion,* the intervener had already obtained judgment in a previous action in default of appearance by the owner Mr Mango. This was an in rem judgment against the ship for dry dock goods and services rendered. In that action, Mr Mango had again not appeared but the interveners (being the holders of the judgment in the previous action) now came in to *defend* this action in place of the owner. It was not a case of an application to set aside an in rem judgment but a proceeding to prevent such a judgment being passed. H

This distinction may explain the true position. If the intervener comes in good time, he can defend the action in place of the owner if the owner himself fails to appear. If he is attempting to set aside a final judgment to which he was not a party, he cannot take defences which the owner had not taken because he is no longer *defending* the claim in place of the shipowner. All he can now do is to assert his interest but the I

judgment *in rem* must stand as it did in *The Lord Strathcona*. It is not irrelevant to point out that both mortgage deeds in favour of Hong Leong contained a power of authority enabling to defend the action in the name of Finego.

We have derived some oblique support for our view that an intervener cannot come in after the shipowners' liability had been pronounced, from *The Alletta* (1974) Ll LR 40 at p 50 where Mocatta J said:

> If a ship may be arrested after judgment on liability has been obtained against her, and she is by the date of the arrest the property of a third party who had bought her without knowledge of the maritime lien, grave injustice may be done. The third party may have no right of indemnity or, which is a less unlikely supposition, his indemnity may be worthless. His vendor may, through lack of adequate funds, incompetent legal advice or other reason, not properly and fully have contested the issue of liability. Despite Mr Sheen's efforts to answer these supposed circumstances by saying that the court would find some method of reopening the issue of liability so as to enable the third party to contest it properly and anew, I cannot see how such an end could be achieved. I refer again to what was said in the *The Point Breeze* at p 142. The position would be quite different from that obtained when an arrest is effected after transfer of the res to such a third party, *but before there had been judgment on liability. The third party can then intervene*; see O 75 r 17. Similar circumstances, mutatis mutandis, can readily and perhaps more realistically be envisaged in relation to the rights of a mortgagee, who can intervene to protect his interest, if this be possible on the facts, against the claim of a holder of an alleged maritime lien provided the vessel mortgaged be arrested *before judgment on liability*; *aliter*, if the arrest be subsequent to such judgment. (Emphasis added.)

So we come back to this position that whoever attempts in Malaysia to set aside a final judgment regularly obtained, be it in rem or in personam, can only do so if he brings himself within the parameters set out in *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143.

We can find nothing inimical to this proposition in *The Glomar* [1953] 2 Lloyds Rep 208, *The Fairport* (No 4) [1967] 1 Lloyds Rep 602 or the passages in 1 *Halbury's Laws of England* (4th Ed) para 454 cited by the Hong Leong's counsel.

Consequently, we must hold that the trial judge was functus officio because this was not a default judgment. If fraud was being alleged (and it was not), the remedy was to bring a fresh action. We must remember that Hong Leong was not content to assert that its mortgages were valid and it had a right to share in the proceeds of the sale. The prayers were that the whole of the judgment of 7 June 1994 be set aside or alternatively that the order of appraisement and sale be set aside. It may be that collusion between unscrupulous shipowners and crew to inflate wages to cheat genuine creditors is fraud but such speculation is not relevant to this judgment.

We now come to the last issue in the second appeal and that is whether by reason of certain irregularities the order made on 7 June 1994 was made without jurisdiction or was null and void especially that part of it relating to the appraisement and sale of the vessel.

The procedure for obtaining default judgments in actions on rem is specifically provided for by O 70 r 20. Where an appearance has been entered by the defendant (as was done by the solicitors for the shipowners in this case), an application for a judgment in default of defence can be made *after* the time for filing the defence has expired. The court has the power to set aside or vary such judgments by default by O 70 r 20(9). In our case, the master and crew moved for summary judgment under O 14 shortly after appearance was entered. They were quite entitled to do this (see *The August 8* [1983] 2 AC 450 at pp 452–453 — the passage is quoted in *The Soeraya Emas* [1992] 1 SLR 33 at p 39).

These alleged irregularities were that the statement of claim did not contain any prayer for appraisement and sale, that the ship was under arrest in the first action and not in the second, that the O 14 application being an application in chambers was not a proper vehicle for an application for appraisement and sale, that it had not been made by motion and served on all the parties, and that by signing judgment, the master and crew had lost their right to arrest the vessel. Various authorities were cited to assist the court to arrive at a finding that the judgment was a nullity in this respect.

But we must bear in mind that there were only four parties involved in this exercise — the shipowners, the crew, the cargo owners and the mortgagees, and at all material stages of the proceedings, both in the first and the second action, all of them knew what the other was doing.

Thus, when the ship was arrested in the first action, the shipowners immediately became involved with the master and crew who filed a caveat in the first action against release and payment out. In the second action on 7 June 1994, counsel for all four parties were present in court, with Hong Leong and cargo owners' counsel holding watching briefs.

The statement of claim in the second action referred to the arrest in the first action. The caveat by the crew in the first action was known to the shipowners. In the circumstances, the omission to request for an appraisement and sale in the statement claim was not a material omission. The object of requiring an application for such an order by way of motion with a supporting affidavit is to ensure that due notice is given to all concerned. In the present case, all concerned were in court when the O 14 application was heard and they knew that an application was being made for appraisement and sale so that the claims of the master and crew could be paid out.

Next, we must examine the purpose of the admiralty practice that the application for appraisement and sale be made in the action in which the arrest was affected, failing which, the text books suggest that a second arrest should be made.

It seems to us that we need to make a distinction here between the traditional admiralty jurisdiction by the general law of the sea and the statutory jurisdiction conferred by the Supreme Court Act 1981 which incorporated and updated the statutory jurisdiction conferred by previous statutes.

In *The Tolten* [1946] P 135, the owners of a wharf in Lagos which was damaged when The Tolten collided with it, brought an action in rem in the High Court at London. The defendants submitted that the court could not have any jurisdiction because the Admiralty Court Act 1861 did not vest the court with jurisdiction to adjudicate in an action in rem for damage done by a vessel to property attached to foreign soil. At p 144, Scott LJ said that:

> The maritime lien is one of the first principles of the law of the sea, and very far-reaching in its effect.

After setting out some dicta by Sir John Jervis in *The Bold Buccleugh*, and by Lord Macnaghten in *The Sara*, he continued:

> In *The Ripon City*, Gorell Barnes J reviewed the history of the maritime lien in our law in a long judgment from which, as far as I know, there has been no subsequent dissent. The following extracts describe the essential characteristics. He said:
>
> > 'The definition of a maritime lien as recognized by the law maritime given by Lord Tenterden has thus been adopted. It is a privileged claim upon a thing in respect of service done to it or injury caused by it, to be carried into effect by legal process.'
>
> Later on he continued:
>
> > 'The result of my examination of these principles and authorities is a follows: The law now recognizes maritime liens in certain classes of claims, the principal being bottomry, salvage, wages, masters' wages, disbursements and liabilities, and damage.'
>
> According to the definition given above, such lien is a privileged claim upon a vessel in respect of service done to it, or injury caused by it, to be carried into effect by legal process.

He then says at pp 145–146:

> The lien consists of the substantive right of putting into operation the admiralty court's executive function of arresting and selling the ship, so as to give clear title to the purchaser, and thereby enforcing distribution of the proceeds amongst the lien creditors in accordance with their several priorities, and subject thereto rateably. I call that function of the court 'executive' because, once the lien is admitted, or is established by evidence of the right to compensation for damage suffered through the defendant ship's negligence, there is then no further judicial function for the court to perform, save that in the registry where priorities, quantum and distribution are dealt with.

We would emphasize the reference to 'the substantive right' and the admiralty court's executive function. The courts have always a liberal view of what constitutes 'wages'. We hold that if a seaman's contract includes emoluments by way of air passages on home leave for himself or his spouse, it comes within the definition of wages. Money for necessaries advanced on the credit of the ship could also give a paramount right of repayment enforceable in rem against the ship (see *Foong Tai v Buchheister* [1908] AC 458).

The learned trial judge has stated in his judgment why he ordered the appraisement and sale. The ship had been idle for a period of time, delay was prejudicial to the condition of the ship and its resale value, and the crew had gone without their wages for a very long period of time. Mr Bernard Kok of counsel for the respondents has referred to O 29 r 4 of the RHC, and DC Jackson in *Enforcement of Maritime Claims* (1985) at p 374 where he says under footnote 33 that:

> A sale to be under [O 75 r 23] is confined to property that must be under arrest, but it would seem that sale under O 29 r 4 is available in all admiralty actions and indeed, the power to order sale pending suit stems from O 29 r 4.

The Westport [1965] 1 Ll LR 547 is an instance of a sale ordered where the ship was deteriorating.

In *The Wexford* (1887) 13 P 10, the court held that it will not make an order for sale of a vessel which is not in the hands of the court. Here, the Brihope was in the hands of the Penang High Court. The arresting sheriff was the same person who had possession custody and complete control (see *The Arantzaze Mendi* [1939] AC 256).

Nor do we think that *The Cap Bon* [1967] 1 Ll LR 543, assists the interveners because the judgment which the plaintiffs in that case wished to enforce was obtained in proceedings of another venue. It can be implied from the Supreme Court Practice 1993 Vol 1 para 75/22/2 that where the res is in the hands of the very same court, the requirement that the res must be under arrest in the action in which the order for appraisement and sale is sought, is only a *practice* and not a mandatory requirement going to jurisdiction.

The Alletta [1974] 1 Ll LR 2 is distinguishable. The plaintiffs in that case obtained judgment on 21 October 1965 against the first defendants who were the owners of the vessel. On 20 June 1973, The Alletta was sold to the second defendants who knew nothing of the plaintiffs' judgment. On 9 July 1973, the plaintiffs' obtained ex parte a warrant of arrest. The court set it aside, inter alia, because the plaintiffs right to arrest The Alletta had merged into the judgment in 1965 and could not be reviewed eight years later.

In our case, the Brihope was already under arrest when the second action was filed and the crew had a hold on the ship by their caveat. It was still under arrest when judgment was obtained. Our O 70 rr 21 and 22 (c/f English O 75 rr 22 and 23) requires certain steps to be taken after a ship has been ordered to be sold in an action in rem. These steps were complied with. On 8 September 1994, in the second action, the ship was arrested by the master and crew. On 3 October 1994, the cargo owners released the vessel from the arrest in the first action, and caveated the release and payment out of the proceeds of sale.

It may be that in falling to arrest the ship in the second action before they applied for judgment under O 14 and simultaneously asked for an appraisement and order of sale, the plaintiffs' solicitors fell short of

perfection. It also may be that in the earlier stages of this litigation, the pleadings filed by all concerned left a lot to be desired. But as Sir Jack Jacob (who prepared the first draft of O 2 of the RHC 1980) said (in *Justice Between Man and Man — Current Legal Problems* (1985) at p 225):

> For myself, I believe that the function of the rules of court is 'to provide guidelines, not trip wires,' ... they should be construed to secure the just, speedy and inexpensive determination of every action.

Before the appraisal and sale finally took place, the plaintiffs' solicitors regularized the position by arresting the vessel in this action, and Hong Leong participated in the exercise. Order 2 r 1 requires the court to treat every non-compliance as an irregularity which the court can remedy as it thinks just. This is indeed what happened and it is not open to Hong Leong to contend that the order made on 7 June 1994 is a nullity.

For these reasons we dismissed this second appeal also with the usual order as to costs.

Third Appeal (Civil Appeal No P–02–332–94)

Mahadev Shankar JCA (delivering the judgment of the court): This is the third and last of the appeals in this series. It is by Hong Leong against the order made by Vincent Ng J on 12 December 1994 whereby he decided the priority of payments to several claimants to the funds deposited in court from the sale of the ship.

Although the background has been set out earlier, the following facts need to be restated.

The order of sale was made on 7 June 1994 in the second action pursuant to an O 14 application. At that time, the vessel was under arrest in the first action by the cargo owners. The crew had entered a caveat in the first action. The vessel was in the custody of the same court in which the second action had been filed.

The statement of claim by the crew, like some of the other pleadings filed, was loosely drafted and lacking in precision. Paragraph (4) averred that the crew had served on board the ship for the periods set out in para (6). No such periods were set out, and if they were contained in the exhibits attached, these particulars were indecipherable. Paragraph (5) referred to the arrest in the first action and 'the expenses the plaintiffs have incurred since the arrest and will continue to incur in maintaining themselves'. Paragraph (6) was a cumulative claim for 'wages due as at 31 March 1994'. It came to RM468,300. The prayer was for this sum and a 'reference to the SAR to assess the amount due to each of the plaintiffs'. The application for summary judgment was for leave to enter final judgment for the total claimed in the statement of claim, interest thereon, sale of the ship so that the plaintiffs' claims could be satisfied, costs and such further relief as the court thought just and appropriate. The order made on 7 June 1994 granted the crew final judgment in terms except that there was an added direction that there be a reference to the senior assistant registrar to assess the total 'ganti rugi' (ie losses or damages) which had to be paid to

each plaintiff. What needs to be emphasized at this point was that there was no claim in so many words that in addition to the wages claimed up to 30 March 1994, the master and crew should be paid the accrued wages up to the date of their discharge.

After the second action was filed, M/s Continental Enterprise Ltd ('Continental') filed a third action in rem against the ship in the same High Court. Continental filed caveats in the first and second actions to protect its interest, apparently as cargo owners.

Since neither Finego nor Hong Leong posted bail or offered any other security for the release or upkeep of the ship or its crew, the master, crew and cargo were left to languish on board until the events hereafter set forth.

In the first and second actions, the cargo owners aforesaid appear to have advanced RM241,370 towards sheriff's expenses and for discharge of the cargo by the crew, and a further RM5,000 for the valuation report after the sheriff was directed to obtain appraisal. The sheriff incurred another RM39,006.44 towards various creditors.

After Finego's application for stay of execution and Hong Leong's application to set aside the judgment were both dismissed on 12 August 1994, the crew as plaintiffs in the second action applied for an independent arrest in the second action on 16 August 1994. The warrant was executed on 8 September 1994. Between 16 August and 6 September, the sheriff, pursuant to directions she obtained from the judge, completed the appraisement and proceeded to tender. At Hong Leong's insistence, there was a second tender, and pursuant to the order of sale on 7 June 1994, the ship was sold for RM1.44m and the funds deposited in court by the sheriff.

On 24 November 1994, the crew issued a notice of motion for an order for determination of the priority payments to the several claimants out of the funds in court. It was served on the plaintiff cargo owners' solicitors in the first action, Continental's solicitors in the third action, and on the solicitors of Finego and of Hong Leong. In other words, *all* the affected parties were notified.

The vessel was released to the new owners the same day. On 29 November 1994 at about 7pm, the master and crew were signed off the vessel. Only then were the crew's solicitors able to quantify the wages they claimed had accrued due from 30 March 1994.

As to this, Hong Leong claims that as the articles of the crew expired on 30 March 1994, they were not entitled to any wages after that date. The crew contended that they were not discharged because there was nobody to discharge them in the presence of the port officer (see s 113 of the Merchant Shipping Ordinance 1952 — 'the MSO'). The hearing was adjourned from 5 to 12 December 1994 to permit Hong Leong's solicitors to study the documents served.

After hearing full arguments Vincent Ng J decided the priority in favour of the master and crew for the whole of their claim. His reasons are set out in his judgment dated 13 January 1995. With respect, we think he has covered the issues admirably.

A Turning now to the grounds on which the judgment was attacked before us, it may be useful to keep in front of our minds the object of this exercise. Hong Leong's first mortgage was for RM2.86m and the second for just over RM435,000. The crew represented their biggest competitor. Their priority had to be displaced.

B In the first place, Hong Leong contended that the judgment of 8 June 1994 was flawed for the same reasons which were ventilated in the second appeal and which we have already rejected.

Secondly, it was submitted that because the crew in the second action had not arrested the ship before the order of sale was obtained on C 7 June 1994, they had no priority, as their lien was only an inchoate lien up to that stage and had never crystallized.

This submission was not properly supported by authority, which indeed seems to go the other way. The material portion of the headnote in *Re Aro Co Ltd* [1979] 1 All ER 32 reads:

D > The mere issue of a writ in rem against a ship by a plaintiff did not invoke the jurisdiction of the Admiralty Court, since that jurisdiction was not invoked until service of the writ on the ship, and therefore the mere issue of the writ in rem did not constitute the plaintiff a secured creditor of the owners of the ship, for the plaintiffs' claim remained inchoate and unperfected until the writ was served.

E In cases like this, it appears important to distinguish between the holder of a maritime lien and a mere claimant whose elevation to the status of a secured creditor only takes place by the invocation of the statutory jurisdiction *and* the arrest of the vessel. Reference may be made here to the penultimate paragraph of the judgment at p 47.

F In any case, in the somewhat unusual circumstances of this case, the ship was already under arrest when the judgment was obtained. *Ex abundanti cautela* the crew independently arrested the ship in the second action before the sale took place.

The next line of argument was that s 122(c) of the MSO only applied G to seamen and not the master of the vessel and therefore the master's wages could not continue to run and be payable until the time of final settlement. The reference to old English authorities like *The Arina* (1887) 12 PD 118 can be quite misleading. We agree with Mr Kok that the position of the master is amply covered by s 145(1) of the MSO which H makes his rights of recovery co-extensive with that of the seamen.

The last point taken was that there was no judgment in so many words for wages which accrued due from 30 March 1994 up to the time of signing off on 9 November 1994. In our second judgment, we referred to *The Tolten* [1946] P 135 at p 146, where the function of the court when it I comes to determining priorities and distribution is referred to as an executive function, 'because, once the lien is admitted ... there is then no further judicial function for the court to perform save that in the registry where priorities, quantum and distribution are dealt with'.

Mr Kok cited *The Fairport* [1966] 2 All ER 1026, where at p 1035, it was held that claims for wages accruing due after the writ was filed could also be claimed. He submitted that no further judgment was required for wages accruing due after the judgment, but before the date of signing off.

Where there is a maritime lien, our view of the matter is that all that is required before payment out of sums accruing due after the judgment is clear evidence that the additional sums claimed are in fact due. In the present case, the additional wages claimed were computed on the basic wages payable on 30 March 1994. The quantum of these wages were not in dispute. The liability for their continued payment till signing off was disputed (by Hong Leong, not Finego) without any legal basis.

We therefore dismissed this appeal also with costs to be taxed and the deposit to be paid to the respondents.

Appeal dismissed.

Reported by Ng Sheau Jiuan